

DAMNED IF YOU DO, DAMNED IF YOU DON'T:

THE PITFALLS AND PRATFALLS OF COMPLYING WITH THE ESTABLISHMENT CLAUSE

Ayesha N. Khan
Potomac Law Group, PLLC
1300 Pennsylvania Avenue, NW
Suite 700
Telephone: (202) 836-7136
Email: akhan@potomaclaw.com



VIDEO:
http://www.nbc.com/*saturday-night-live/video/shimmer*-floor-wax/n8625?snl=1

THE LEMON TEST: THREE HURDLES



Does challenged action lack a secular purpose?

Does challenged action have the primary effect of advancing religion?

Does challenged action “excessively entangle” government with religion?



The Lemon test is a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."

OTHER TESTS



HISTORICAL

Would Founders have viewed action as violation?



COERCION

Does practice coerce participation in religious exercise?



LEGAL JUDGMENT

"There is no substitute for the exercise of legal judgment."

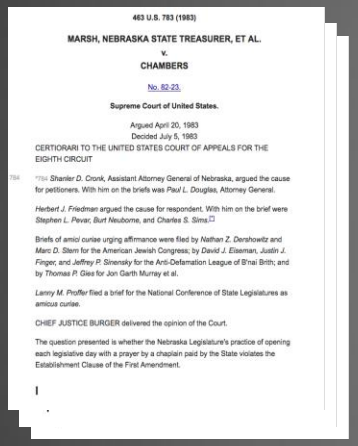


ENDORSEMENT

Does practice have purpose or effect of endorsing religion?

ISSUE: LEGISLATIVE PRAYER

Marsh v. Chambers (1983)



463 U.S. 783 (1983)

MARSH, NEBRASKA STATE TREASURER, ET AL.
v.
CHAMBERS

No. 82-23.

Supreme Court of United States.

Argued April 20, 1983
Decided July 5, 1983

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

784 *Shanler D. Cronk*, Assistant Attorney General of Nebraska, argued the cause for petitioners. With him on the briefs was *Paul L. Douglas*, Attorney General.

Herbert J. Friedman argued the cause for respondent. With him on the brief were *Stephen L. Pevar*, *Burt Neuborne*, and *Charles S. Sims*.[*]

Briefs of *amici curiae* urging affirmance were filed by *Nathan Z. Dershowitz* and *Marc D. Stern* for the American Jewish Congress; by *David J. Eiseman*, *Justin J. Finger*, and *Jeffrey P. Sinensky* for the Anti-Defamation League of B'nai B'rith; and by *Thomas P. Gies* for Jon Garth Murray et al.

Lanny M. Proffer filed a brief for the National Conference of State Legislatures as *amicus curiae*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

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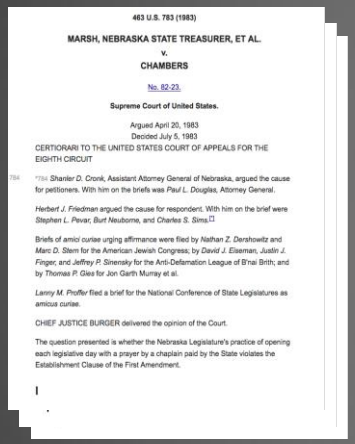
Nondenominational prayers at opening of legislative sessions

Action upheld ✓

- "Unambiguous and unbroken history of more than 200 years"
- Adult audience can resist peer pressure, come and go if desired
- But: Should not "proselytize or advance any one, or disparage any other, faith or belief"

LEGISLATIVE PRAYER REVISITED

Town of Greece v. Galloway (2014)



463 U.S. 783 (1983)

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- Invited clergy
- Explicitly Christian prayers

Practice upheld (5-4) ✓

- Founders accustomed to sectarian prayers
- Government should not distinguish between sectarian and nonsectarian
- Audience members can leave the room or voice opposition
- Prayers not delivered during policymaking
- Equal opportunity



"THESE PRE-MEETING INVOCATIONS MAY HAVE" GOTTEN OUT-OF-HAND!

Not So Fast …

- Avoid prayers that “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion”

- Don’t direct audience to participate in prayers, single out dissidents for criticism, or indicate that decisions might be influenced by a person’s participation

LEGISLATIVE PRAYER POST-TOWN OF GREECE



Yay: Lund v. Rowan County (4th)

- "Please stand" and "let us pray"
- Some comments critical of objectors



Nay: Bormuth v. County of Jackson (6th)

- "Rise" and "assume reverent position"
- Commissioners disfavor religious minorities
- Commissioners call plaintiff "nitwit" & deny him position


WE HAD TO REMOVE THE COMMANDMENTS BECAUSE RELIGION HAS NO PLACE IN THE COURT HOUSE.
...PUT YOUR HAND ON THE BIBLE AND REPEAT AFTER ME.
MIKE PETERS
grimmy.com

ISSUE:
GOVERNMENT-SPONSORED RELIGIOUS DISPLAYS

General Rules

1. Government cannot act with religious purpose
2. Longstanding non-controversial religious displays OK
3. Holiday displays with secular symbols OK

OTHER CONSIDERATIONS REGARDING RELIGIOUS DISPLAYS

- Can display Ten Commandments with other seminal political documents for educational purposes
- Singling out Ten Commandments is problematic
- Avoid religious statements or and religious unveiling ceremonies
- New displays are suspect


WHAT SHOULD WE DO WITH PEOPLE WHO RELY ON GOVERNMENT HANDOUTS BUT ARE TOO LAZY TO WORK?
KICK THEM OUT OF CONGRESS!
OPINION POLL
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RUBES

ISSUE:
"INDIRECT" FUNDING OF RELIGION





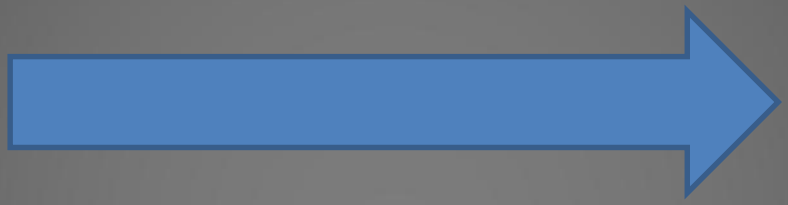


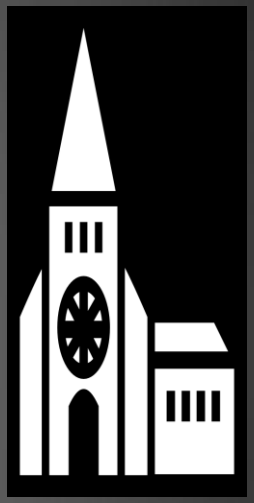
Permissible if Neutral + Private Choice

- Mueller v. Allen (1983)
- Witters v. Washington Dep't of Servs. for the Blind (1986)
- Zobrest v. Catalina Foothills Sch. Dist. (1993)
- Zelman v. Simmons-Harris (2002)

ISSUE:
“DIRECT AID” TO RELIGIOUS INSTITUTIONS







Requires more complex analysis

- Pervasively sectarian” doctrine
- Aid restricted to secular use okay

CASE TO WATCH

Trinity Lutheran Church of Columbia, Inc. v. Pauley









Missouri: "State Constitution prohibits us from aiding churches"

Church: "That's hostile to religion and violates the federal Constitution!"

Eighth Circuit: "Missouri wins 2-1!"

SCOTUS: "Not so fast!"

Feel free to contact me for additional information.
I love talking about this stuff!



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Telephone: (202) 836-7136
Email: akhan@potomaclaw.com